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In the Supreme Court of the United States

OCTOBER TERM, 1957

CARLOS MARCELLO, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Court of Appeals rendered no opinion. The order of the Court of Appeals, one judge dissenting (R. 39; Pet. App. 11-12), is not reported.

JURISDICTION

The order of the Court of Appeals was entered on August 1, 1957 (R. 39; Pet. App. 11-12). The petition for certiorari was filed on October 24, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a stipulation between petitioner and the government, providing that petitioner be "re-

leased" upon "administrative bail" conditioned upon his delivery for deportation upon three-days' notice, remained in effect after cancellation of the bail at the end of the six-months' period for administrative bail under the Immigration and Nationality Act and the beginning of the statutory "supervision" period; and whether, in any event, the three days' notice of deportation actually given petitioner on November 1, 1956, sufficed.

2. Whether the orders of the Court of Appeals, rejecting petitioner's motion for a stay of mandate and for stay of deportation unless three-days' notice of deportation be given, and holding moot petitioner's complaint as to the validity of restrictions imposed by the prior order of supervision (which included no three-day notice provision), are vulnerable to petitioner's challenge that the Court of Appeals failed to dispose of the issue of a three-day notice.

STATUTE INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952 are set forth in Appendix A, *infra*, pp. 15-16.

STATEMENT

Deportation proceedings against petitioner were instituted on December 30, 1952 (R. 3). On February 20, 1953, he was found deportable by reason of convictions of narcotics law violations (R. 5-6). Petitioner's appeal to the Board of Immigration Appeals was dismissed on June 1, 1953 (5 I. & N. Dec. 261), and he was taken into custody for deportation on June 2, 1953, on which day he filed a petition for

a writ of habeas corpus (R. 6). The petition was dismissed on June 8, 1953, the court finding the deportation order valid (113 F. Supp. 22), and the dismissal was upheld in the Court of Appeals for the Fifth Circuit on May 6, 1954 (212 F. 2d 830) and in this Court on May 31, 1955 (*Marcello* v. *Bonds*, 349 U.S. 302, rehearing denied, 350 U.S. 856).[1]

In June 1955, petitioner again challenged the deportation order, in a complaint for a declaratory judgment in the District Court for the District of Columbia (No. 2763-55), and sought to restrain the government from deporting him (R. 8-9). Also, in a petition for writ of habeas corpus filed in the District Court at New Orleans on August 26, 1955, petitioner charged that the government was unable to deport him and that he was being detained illegally (R. 7).

In the latter habeas corpus proceeding, the District Court, on August 30, 1955, dismissed the writ, and both the District Court and the Court of Appeals for the Fifth Circuit denied bail pending appeal (R. 7). On September 16, 1955, Mr. Justice Black, upon consideration of the application for release on bail "pending a determination of the petitioner's appeal in the United States Court of Ap-

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[1] Prior to these proceedings, petitioner was held on appeal to have been justified in refusing, on grounds of self-incrimination, to answer questions of a congressional committee, in view of his reputation as "Number 1 gangster and racketeer in Louisiana," "Crime Czar," and "head of the Mafia" (*Marcello* v. *United States*, 196 F. 2d 437, 440-441 (C.A. 5)).

peals for the Fifth Circuit", ordered such release "until his deportation can be effectuated, provided, however, that the petitioner shall execute" a $10,000 bond "conditioned that he will appear for deportation upon three days notice when arrangements for his deportation have been completed, and the Immigration and Naturalization Service notifies him to appear".[2] Petitioner was released upon bond pursuant to this order, but petitioner's attorney and the government entered into negotiations for a stipulation for release of petitioner upon administrative bail, petitioner's counsel proposing that the stipulation include the same conditions as the order of Mr. Justice Black, but the government objecting thereto (R. 8).[3] On October 10, 1955, petitioner's counsel and the Solicitor General entered into a stipulation, in language different from Mr. Black's order, pro-

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[2] The text of the order was as follows (R. 17):

"Upon consideration of the application of the petitioner, Carlos Marcello, for his release from custody on bail pending a determination of the petitioner's appeal in the United States Court of Appeals for the Fifth Circuit and the opposition of the Government herein, it is

"Ordered that the petitioner, Carlos Marcello, be released from custody and admitted to bail until his deportation can be effectuated, provided, however, that the petitioner shall execute and file with the Clerk of the District Court for the Eastern District of Louisiana a good and sufficient surety in the sum of $10,000.00, conditioned that he will appear for deportation upon three days notice when arrangements for his deportation have been completed, and the Immigration and Naturalization Service notifies him to appear."

[3] By moving for summary judgment in the District Court (R. 12), petitioner admitted all the well-pleaded allegations of fact in the respondent's answer.

viding that petitioner be released upon "administrative bail" of $10,000 conditioned for delivery into custody for deportation upon three-days notice, and that "such bond" be "substituted" for the "judicial" bond heretofore executed.[4]

Pursuant to the stipulation, Mr. Justice Black, on October 11, 1955, vacated his order of September 16, 1955, and the habeas corpus proceeding in the Fifth Circuit was dismissed as moot (R. 8). On October 19, 1955, petitioner was released upon administrative bond, conditioned upon producing of petitioner upon three-days notice (R. 8, 19-21).

Petitioner's second challenge to the deportation order itself, in District of Columbia action No. 2763-55, *supra*, was thereafter dismissed, upon the government's motion for summary judgment, on October 25, 1955. When six months passed subsequent to this final order without the government's being able to deport petitioner, he was directed to appear at the local office of the Immigration and Naturalization Service. On April 26, 1956, he was notified that he was enlarged upon supervision as provided in Section 242(d) of the Immigration and Nationality

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[4] The text of the stipulation was as follows (R. 18):

"It is hereby stipulated by and between counsel for the respective parties herein, that the petitioner will be released upon administrative bail in the amount of $10,000, conditioned for his delivery into custody for deportation upon three days' notice, that such bond will be substituted for the judicial bond previously executed herein and that, in view of the foregoing, counsel herein consent to the vacating of the Order of Mr. Justice Black dated September 16, 1955".

Act of 1952 (*infra*, App. A, pp. 15-16), and the administrative bond was cancelled (R. 9, 22).

The order of supervision provided that petitioner should not leave the parishes of Orleans, Jefferson, or St. Bernard, Louisiana, without first obtaining permission of a representative of the Acting District Director at New Orleans, Louisiana (R. 9). Petitioner protested that the limitation on his travel was onerous and that the order of supervision should contain a three-day notice provision corresponding to the provision in the bail bond (R. 22-23). Relief was given petitioner to the extent of eliminating the requirement of permission to travel and requiring only notice of petitioner's travels (R. 22).[5] With respect to a three-day notice of deportation, petitioner was informed, on May 3, 1956, that the expiration of the six-months statutory period and the cancellation of the $10,000 bond ended this assurance of petitioner's appearance when deportation was imminent, and that the three-day notice provision was contemplated only for the period of the administrative bail bond (R. 22-23). Petitioner thereupon (on May 16, 1956) filed the instant complaint in the District Court for the District of Columbia (No. 2046-56) requesting a judgment that respondent was violating the stipulation and interfering with petitioner's liberty in "gross". The complaint charged an unlawful abuse of "discretion", and also requested an injunction against the supervision order (R. 5).

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[5] Various changes in this aspect of the supervision were later made.

On October 30, 1956, one day prior to the issuance of a travel document by the Italian consul, petitioner filed a motion for a preliminary injunction against deportation except upon three-days notice (R. 12). The District Court issued an order restraining respondent from acting except upon such notice. Accordingly, on November 1, 1956, plaintiff was served with notice of intention to take him into custody and deport him after the expiration of 72 hours (Pet. 6).

However, on October 31, 1956, the date of issuance of the Italian travel document, petitioner had filed another complaint in the District Court for the District of Columbia (No. 4277-56), for the third time challenging the validity of the order of deportation. On November 5, 1956, the District Court denied petitioner's motion for preliminary injunction in that proceeding. Appeal was taken on the same day to the Court of Appeals for the District of Columbia Circuit (C.A. D.C., No. 13,595), which granted a stay of deportation pending appeal. On December 7, 1956, the District Court, in the same case (No. 4277-56), granted the government's motion for summary judgment, from which appeal was also taken (C.A. D.C., No. 13,653). Both appeals (No. 13,595 and No. 13,653) were decided in favor of the government on June 13, 1957. *Marcello* v. *Brownell*, 245 F. 2d 279 (C.A. D.C.). Accordingly, the deportation order has now been held valid in three separate judicial proceedings.

In the instant case (No. 2046-56), the District Court, on January 2, 1957, entered an order granting the government's motion for summary judgment

and dismissing the complaint to enjoin enforcement of the supervision order (R. 24). Here, too, petitioner filed an appeal in the Court of Appeals, C.A. D.C., No. 13655 (R. 24-25). On June 14, 1957, the government moved for leave to file, in this appellate proceeding, a copy of the order of supervision as amended pursuant to the decision of this Court in *United States* v. *Witkovich*, 353 U.S. 194. Both the government and petitioner agreed that this amendment left open only the issue of the necessity of a three-day notice (R. 30-33). Petitioner moved, however, on June 24, 1957, that the mandate in the cases on the merits of the deportation order, theretofore decided by the Court of Appeals on June 13, 1957 (Nos. 13,595 and 13,653, *supra*), be stayed or, in the alternative, that a stay of deportation be granted in the instant case unless three-days' notice of deportation be given (R. 32-33).

On August 1, 1957, the Court of Appeals entered the following order in Nos. 13,595 and 13,653 (App. B, *infra*, pp. 17-18):

> Upon consideration of appellant's motion to stay the mandate in the above case or in the alternative to stay deportation of appellant unless three days' notice of such deportation is first provided to appellant, and of appellee's motion thereto, it is
>
> ORDERED by the Court that the aforesaid appellant's motion be, and it is hereby, denied and that a copy of the opinion and certified copy of the judgment of this Court issue to the District Court forthwith.

On the same day, the Court of Appeals, in the present case (No. 13,655), remanded the case to the District Court "with directions to vacate its judgment and with directions to dismiss as moot the complaint as to the question of the validity of restrictions imposed by the prior order of deportation"[6] (Pet. App. 11-12). It is this order of the Court of Appeals that is now challenged in this Court by petitioner. There is no challenge to the affirmance or the order in Nos. 13,595 and 13,653, *supra*.

ARGUMENT

Petitioner seeks review by this Court of extremely limited questions peculiar to his particular, much-litigated, case. His contentions are all unfounded and obviously present no issue of importance.

1. Petitioner was actually given three-days' notice of deportation on November 1, 1956 (*supra*, p. 7). Only his own course of litigation has blocked the earlier and later efforts of the government to effect the deportation (*supra*, pp. 2-9). He now claims that the notice was insufficient in that the third day was a Sunday (Pet. 6). But the stipulation invoked by petitioner (assuming *arguendo* its existence beyond April 26, 1956) did not provide for a day of grace in the case of a Sunday, nor should the specific language of the stipulation be rewritten to add the additional time. Where meritorious considerations require exclusion of Sundays and holidays in computing time, as in the case of documents to

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[6] This obviously referred to the order of supervision originally challenged in the present proceeding (*supra*, p. 6).

be filed with offices closed on such days, the exclusion is specifically stated and is not left to implication. *E.g.*, Rule 34 of the Rules of this Court specifically applies the Sunday exclusion only to time periods prescribed (1) by the rules, (2) by an "order" of the Court, or (3) by statute.

2. Although three days' notice was, in actual fact, given, such notice was not required after petitioner's bail bond had been cancelled at the end of the statutory six-months period of detention or bail. The order of Mr. Justice Black (*supra*, pp. 3-4) dealt only with an application for release "on bail pending a determination of the petitioner's appeal in the United States Court of Appeals for the Fifth Circuit." The further language of the order directing admission to bail "until his deportation" is not to be torn from context to require bail after the conclusion of the appeal or the litigation then pending. The later stipulation (*supra*, p. 5) provided only that petitioner be "released" upon "administrative" bail for $10,000. It was this bail, and only this bail, that was conditioned upon three days' notice of deportation.[7] Neither petitioner's counsel nor the government could have been ignorant of, or deemed to stipulate in contravention of, the statutes and regulations which gave the government authority to detain

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[7] Petitioner is thus clearly in error in asserting (Pet. 9) that the stipulation provides "for three days' notice prior to petitioner's delivery into custody for deportation." No such provision was made, but only a provision for administrative bail embodying that condition, the condition patently to expire with the expiration of the bail bond.

or release on bond during a period of six months following the final order of deportation and which further provided that at the end of that period the alien "shall" be subject, instead, to supervision (App. A, *infra*, pp. 15-16). Cf. *Shrode* v. *Rowoldt*, 213 F. 2d 810 (C.A. 8). A stipulation for "bail" is not reasonably read to carry over into the new, non-bail, supervision period—in which the entire body of precautions with respect to the alien are to be revaluated *de novo*, in an exercise of discretion upon the basis of specific criteria enunciated in the statute (App. A, *infra*, pp. 15-16).

Pursuant to the statute, petitioner was released from bail on April 26, 1956—at the end of the six-months' period (*supra*, pp. 5-6). There was then no $10,000 bond to assure that petitioner, if given three-days' notice of deportation, would not utilize the period to disappear. His reputation, according to his own showing when he desired to sustain his assertion of a claim of self-incrimination (*Marcello* v. *United States*, 196 F. 2d 437 (C.A. 5)), was that of an unscrupulous and dangerous man. The government was not required to afford petitioner notice, and a running start in avoidance of deportation at a time when the protection afforded by the bail bond was no longer in effect.

Petitioner, in an effort to adduce broad and important implications from his limited factual situation, contends that it is "morally decent and reasonable" to give a long-resident alien three-days' notice of deportation (Pet. 7). If the contention is that in every case such notice should be required,

the proposal is one for the legislative consideration of Congress, or, perhaps the policy-making functions of the administrators. On the facts of the instant case, in the light of petitioner's reputation, his long notice of the imminence of deportation, and his repeated efforts to delay that deportation, it cannot be said that further notice is required, morally or legally.[8]

3. Petitioner contends that the issue of three-days' notice "should have been decided" by the Court of Appeals, as if that question had not been decided (Pet. 10). But the fact is that the issue was decided. Petitioner's contention arises out of a failure to consider all the elements in his maze of litigation, notably the order of the Court of Appeals entered in Nos. 13,595 and 13,653 on August 1, 1957, which is reprinted in Appendix B, *infra*, pp. 17-18. It was petitioner who suggested the alternative of shifting the decision of the "three-day" issue to Nos. 13,595 and 13,653, with his motion of June 24, 1957 (*supra*,

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[8] Petitioner argues (Pet. 8) that the six-months' period for detention and bail was to be dated, not from the final court order in the proceeding pending at the time of the stipulation (D. C. action No. 2763-55, *supra*, pp. 3-5) but from the final court order in yet further court proceedings (C.A.D.C., Nos. 13595 and 13653) instituted by petitioner *more than a year after* the stipulation. The contention is without merit, for the new proceedings clearly were not contemplated by at least one of the stipulating parties—the government. The stipulation was for release of petitioner at that time and in connection with the then pending litigation, not for an unending series of releases upon new bonds each time petitioner commenced new litigation and without regard to the circumstances at the time of the new litigation.

p. 8). It was petitioner's own contention, likewise, that if the government could deport him under the judgments in Nos. 13,595 and 13,653 without giving the three-days' notice, the issue could no longer be determined in the present case, No. 13,655 (R. 32-33). Accordingly, when the Court of Appeals, in Nos. 13,595 and 13,653, refused both petitioner's request for a stay of the mandate and his request for a stay of deportation unless three-days' notice be given, it decided the three-day notice issue. The issue of notice in the present case, No. 13,655, was thus mooted by the order in Nos. 13,595 and 13,653, if it was not already moot by reason of the actual issuance of a three-day notice on November 1, 1956 (*supra*, pp. 7, 9-10).[9]

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[9] The fact, twice dwelled upon by petitioner (Pet. 7, 9), that petitioner and the government had referred to the notice issue as a still subsisting issue in some earlier court documents, was not binding upon the Court of Appeals, nor, of course, did the government entertain or assert any such position after the orders of the Court of Appeals on August 1, 1957.

CONCLUSION

The judgment below is a correct disposition of a narrow and particular factual problem upon the basis of established principles. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

NOVEMBER 1957.

APPENDIX A

STATUTE INVOLVED

The Immigration and Nationality Act of 1952, Section 242(c) and (d) (66 Stat. 210, 211; 8 U.S.C. 1252(c) and (d)), as amended September 3, 1954 (68 Stat. 1232; 8 U.S.C. (Supp. IV) 1252(d)):

> (c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe. * * * If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section.
>
> (d) Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information,

whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. * * *

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1957

United States Court of Appeals
For the
District of Columbia Circuit

FILED AUG. 1, 1957

JOSEPH W. STEWART,
Clerk

No. 13,595 and 13,653

CARLOS MARCELLO, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, APPELLEE

Before: Wilbur K. Miller, Bazelon and Washington, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellant's motion to stay the mandate in the above case or in the alternative to stay deportation of appellant unless three days' notice of such deportation is first provided to appellant, and of appellee's motion thereto, it is

ORDERED by the Court that the aforesaid appellant's motion be, and it is hereby, denied and that

a copy of the opinion and certified copy of the judgment of this Court issue to the District Court forthwith.

Per Curiam.

Dated August 1, 1957.

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